Petition

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81-1225

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

HILMER B. SANDINI,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA FOR THE FOURTH DISTRICT

EDWARD M. KAY, ESQUIRE
D. ROBERT SILVER, ESQUIRE
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QUESTION PRESENTED

Whether privileged information given willfully to law enforcement authorities by defendant's attorney in the guise of a confidential informant and without the defendant's knowledge in violation of the attorney-client privilege, as well as the sixth amendment, may be used to establish probable cause necessary to support the issuance of a search warrant under the fourth amendment to the United States Constitution.

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428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed. 2d 1067
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STATE OF FLORIDA,

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PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA FOR THE FOURTH DISTRICT

OPINION BELOW

The opinion of the District Court of Appeal is reported at 395 So.2d 1178 and appears in the Appendix hereto. (App. A). No opinion was rendered by the Supreme Court of Florida.

JURISDICTION

The decision of the District Court of Appeal for the Fourth District was entered on March 4, 1981. A timely motion for rehearing was denied on April 22, 1981. The Supreme Court of Florida denied to accept certiorari jurisdiction in this case on October 28, 1981, and this petition for certiorari was timely filed within sixty (60) days of that date pursuant to Rule 20. This Court's jurisdiction is invoked under Title 28 U.S.C., Section 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

United States Constitution, Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

United States Constitution, Amendment XIV, Section 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

I.

GENERAL BACKGROUND

Hilmer B. Sandini, pursuant to the execution of a search warrant at his residence, was charged by the State of Florida with certain possessory offenses, *inter alia*. The Petitioner moved to suppress the contraband seized by the police at the time of the execution of the search warrant, which motion was granted by the trial court. (App. A). Thereafter, the State of Florida appealed the trial court's ruling on the motion to suppress to the District Court of Appeal for Florida for the Fourth District. That court reversed the trial court's ruling on the motion to suppress with a written opinion and remanded the cause for further proceedings. (App. A). Thereafter, the Supreme Court of Florida declined to accept certiorari jurisdiction of the case.

II.

FACTS MATERIAL TO THE QUESTION PRESENTED

The facts relevant to the question involved (a recitation of which is also contained in the trial court's suppression order [App. A]) may be summarized as follows:

From April of 1977 until September of 1977, an ongoing professional relationship existed between the Petitioner and Mr. Robert S. McCain, Jr., an attorney, in that the Petitioner employed Mr. McCain to represent him on several different legal matters. During this period of time, a number of confidential and privileged communications were had between the Petitioner and Attorney McCain. Subsequent to these privileged communications with the Petitioner, Attorney McCain disclosed the substance of the portions of these communications to both a special agent for the F.B.I. as well as members of the Fort Lauderdale Police Department. The privileged communications by Mr. McCain to the aforesaid law enforcement authorities were styled as those of a "confidential informant" by the Fort Lauderdale Police Department who sought and obtained, as a result of the privileged communications contained in the search warrant affidavit, a search warrant for the residence of the Petitioner on December 7, 1977. The "confidential informant" referred to in the search warrant affidavit applied for by the Fort Lauderdale Police Department was in fact Attorney McCain. On December 7, 1977, the aforesaid search warrant for Petitioner's residence was executed, as a result of which the Petitioner was charged with certain crimes.

III.

MANNER IN WHICH THE FEDERAL QUESTION WAS RAISED

By written motion, the Petitioner moved to suppress as evidence against him the contraband seized at the time of the execution of the search warrant. In his motion, the Petitioner specifically alleged that the search warrant of his residence was not supported by probable cause and therefore the search of his residence was violative of his constitutional rights under the Fourth Amendment to the United States Constitution as well as the corresponding provision contained in the Florida Constitution. (App. A). At the suppression hearing, Petitioner's counsel argued, *inter alia* that the Petitioner's Fourth and Sixth Amendment rights had been violated and therefore the search of the Petitioner's residence was unlawful. Subsequently, the trial court granted the motion to suppress stating, either at the suppression hearing or in its suppression order, that the search warrant of the Petitioner's constitutional rights guaranteed him under the Fourth and Sixth Amendments to the United States Constitution. (App. A).

Upon the trial court's granting of the motion to suppress, the State of Florida appealed to the District Court of Appeal of Florida for the Fourth District. On appeal, the State of Florida contended that the exclusionary rule had no applicability in this case since it claimed that no police misconduct existed. The State of Florida stated that the proper remedy in this case was through disciplinary proceedings against Attorney McCain.

In its decision, the District Court of Appeal, with respect to the Fourth Amendment, held that privileged material voluntarily given by an attorney in violation of his duty to his client

may be used to establish probable cause necessary to support the issuance of a search warrant. With respect to the exclusionary rule, the District Court of Appeal cited this Honorable Court's decision of *Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed. 2d 1067 (1976). Furthermore, with respect to the Sixth Amendment, the District Court of Appeal held that the attorney-client privilege is relatively limited in scope, and therefore does not require the exclusion of evidence voluntarily submitted by an attorney in violation of the attorney-client privilege.

Thus, the federal question presented herein has been properly raised and appropriately preserved at all stages of this case.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

The Petitioner argues the following reasons why this petition for writ of certiorari should be granted:

1. The decision below raises the significant, novel and recurring substantial federal question concerning the proper scope of the exclusionary rule as it relates to the legality of a search which is founded upon an affidavit containing privileged information.

2. The decision below is incorrect since it only encourages police misconduct and only penalizes the client whose confidences have been violated, thereby adversely affecting the attorney-client privilege.

I.

THE DECISION BELOW RAISES THE SIGNIFICANT, NOVEL AND RECURRING SUBSTANTIAL FEDERAL QUESTION CONCERNING THE PROPER SCOPE OF THE EXCLUSIONARY RULE AS IT RELATES TO THE LEGALITY OF A SEARCH WHICH IS FOUNDED UPON AN AFFIDAVIT CONTAINING PRIVILEGED INFORMATION

As the District Court of Appeal stated in its decision, the issue involved in this case is whether privileged material voluntarily offered by an attorney in violation of his duty to his client may be used to establish the probable cause necessary to support the issuance of a search warrant. Prior to the District Court of Appeal's decision, this precise issue had not been decided by any other court in the United States. Indeed, this was a case totally without any legal precedent.

The Petitioner submits that this Honorable Court should consider this case because of the far-reaching ramifications it presents with respect to not only the scope of the exclusionary rule, but also to the sacred attorney-client privilege. The Petitioner believes that the court below set a very dangerous precedent with respect to the scope of the exclusionary rule as well as essentially dealing a death blow to the attorney-client privilege. Consequently, the Petitioner contends that this Honorable Court, as opposed to a lower state court, should determine this extremely novel issue which will undoubtedly have a significant effect in courts throughout the United States.

The importance of the issue presented in this case cannot be understated. First of all, as stated above, there is simply no controlling legal precedent with respect to this precise issue. Moreover, numerous persons involved in the criminal justice system will be significantly affected by the decision of the court below. In light of the decision below, the Petitioner submits that police officers will undoubtedly be encouraged, or at the very least not inhibited, to use privileged information in preparing a search warrant affidavit. Furthermore, the decision below would make it more possible, if not encourage, police agencies to seek out and, in fact, use attorneys as confidential informants in their cases. With respect to accused-clients, the obvious effect of the decision below is that accused-clients will not feel free to divulge information about their cases to their attorneys, thereby extinguishing the purpose of the attorney-client privilege. Furthermore, the accused-clients will not be truly afforded their Sixth Amendment right to effective assistance of counsel. Finally, with respect to attorneys, the decision below would obviously effect them in that they would not be able to obtain the complete and necessary information from their accused-client in order to properly prepare their client's defense. Therefore, the attorneys obviously could not afford their accused-client his/her Sixth Amendment right to assistance of counsel. Further, and however distasteful, the decision below may very well encourage attorneys to disseminate information to law enforcement authorities with respect to their clients.

Consequently, in light of the fact that there exists no legal precedent with respect to the issue *sub judice*, as well as the classes of persons who will be affected by the decision below, the Petitioner respectfully submits that this Honorable Court should consider and resolve this important issue.

II.

THE DECISION BELOW IS INCORRECT SINCE IT ONLY ENCOURAGES POLICE MISCONDUCT AND ONLY PENALIZES THE CLIENT WHOSE CONFIDENCES HAVE BEEN VIOLATED, THEREBY ADVERSELY AFFECTING THE ATTORNEY-CLIENT PRIVILEGE

The decision below necessarily held that use by the police of information voluntarily offered by an attorney in violation of the attorney-client privilege did not constitute police misconduct. However, the court's ruling that such information could be used to establish probable cause necessary to support the issuance of a search warrant only serves to encourage police misconduct. As stated in I, the decision below obviously encourages law enforcement authorities to attempt to utilize attorneys as confidential informants without any fear of such action being labeled "police misconduct". The Petitioner submits that this possibility, if not probability, is completely unconsciounable and offends due process of law, one's Sixth Amendment right to assistance of counsel and the attorney-client privilege which is based upon the Sixth Amendment.

Moreover, the Petitioner contends that the decision below essentially extinguished the purpose of the attorney-client privilege, i.e., to encourage the free and open disclosure of information between an attorney and his client. In view of the decision below, clients accused of committing crimes simply do not have any reason to trust their attorneys anymore. It is quite clear that if an attorney can disclose incriminating information about his client to law enforcement authorities

which may ultimately result in having the client arrested (which was done in the present case), then the client will obviously not be extremely anxious to speak with his attorney about his case. The client will be afraid to be candid with his attorney and there will be a strong likelihood that he/she would be decietful with his/her attorney and refrain from giving the attorney certain information. All in all, the purpose of the attorney-client privilege simply would not be served. Consequently, in light of the decision below, with respect to criminal defense attorneys and their clients, there essentially will no longer be a legal entity known as the attorney-client privilege. Without the attorney-client privilege, an attorney will obviously not be able to render effective assistance of counsel as mandated by the Sixth Amendment.

With respect to the Fourth Amendment and the applicability of the exclusionary rule in this case, the District Court of Appeal held that the act by the police of accepting information from an attorney in violation of the attorney-client privilege and using that information simply did not rise to the level of "police misconduct". (App. A). The District Court of Appeal cited and quoted from the case of *Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed. 2nd 1067 (1976), in support of its decision. Hence, since the District Court of Appeal essentially stated that there was no police misconduct to deter in this case, it held the exclusionary rule was inapplicable. However, notwithstanding, the Petitioner claims that the privileged information provided by Attorney McCain was clearly the proximate cause of the police conduct taken herein, i.e., the execution of the search warrant at the Petitioner's residence. As the trial court concluded in its suppression order, ". . . but for the privileged information provided by McCain, a search warrant for the residence of the Defendant (Petitioner) could not have been procured . . . ."

(App. A). Consequently, without the disclosures made by McCain, there was simply no probable cause to issue a search warrant. Therefore, being predicated upon privileged information between attorney and client, the Petitioner submits that the police action taken herein was essentially police misconduct which the exclusionary rule seek to prevent. As a result, the Petitioner claims that the search of his residence was clearly illegal and that the exclusionary rule was properly applied by the trial court to prohibit the admission into evidence of any of the fruits of that search. The District Court of Appeal clearly erred in holding otherwise.

As the State of Florida suggested on appeal in this case, the proper remedy in a case such as this is to discipline the attorney who violates the attorney-client privilege. However, this approach completely ignores the plight of the accused-client who is faced with criminal prosecution. The Petitioner claims that the discipline of an attorney who violates the attorney-client privilege will obviously not deter the police from still using the privileged information obtained from that attorney. However, the suppression of evidence, will tend more to do so.

In light of the foregoing, the Petitioner respectfully asks this Honorable Court to consider the important constitutional issue presented in this case.

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be granted.

Respectfully submitted,

EDWARD M. KAY,
ESQUIRE

D. ROBERT SILBER,
ESQUIRE

DOUGLAS J. GLAID,
ESQUIRE

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished to the Florida Attorney General's Office, 111 Georgia Avenue, Room 204, West Palm Beach, Florida this 23rd day of December, 1981.

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DOUGLAS J. GLAID,
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Appendix

APPENDIX A

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOURTH DISTRICT

JANUARY TERM, 1981

STATE OF FLORIDA,	) NOT FINAL UNTIL TIME
	) TO FILE REHEARING
Appellant,	) PETITION AND, IF
	) FILED, DISPOSED OF.
	)
v.	) CASE NO. 79-1810.
	)
HILMER B. SANDINI,	)
	)
Appellee.	)

Opinion filed March 4, 1981

Non-final appeal from the Circuit Court for Broward County; Mel Grossman, Judge.

Jim Smith, Attorney General, Tallahassee, and Russell S. Bohn, Assistant Attorney General, West Palm Beach, for appellant.

Douglas J. Glaid of Kay and Silber, P.A., Fort Lauderdale, for appellee.

HERSEY, J.

The state appeals from a non-final order granting a motion to suppress evidence. The motion questioned the sufficiency of an affidavit to establish probable cause for the issuance of a search warrant, in the execution of which the evidence had been seized. The trial court held that the exclusionary rule rendered impermissible any reliance on information contained in the affidavit because it was supplied in violation of an attorney-client privilege. Since the court found that an attorney-client relationship existed at the time and in connection with the allegations contained in the affidavit, by necessary implication it determined that the information did not pertain to on-going criminal activity or fit within any other exception to the privilege.

Recitation of the factual background is unnecessary either to an understanding or to a resolution of the single issue to be treated by this opinion. Our determination that neither the exclusionary rule nor any other principle prohibits reliance on information volunteered by an attorney in violation of the attorney-client privilege for the establishment of probable cause renders moot the preliminary inquiries raised by appellant as to the existence and extent of the privilege on the specific facts of this case. The issue then is whether privileged material voluntarily offered by an attorney in violation of his duty to his client may be used to establish the probable cause necessary to support the issuance of a search warrant.

The argument advanced by appellee for application of some form of exclusionary rule in these circumstances is multi-faceted. We therefore commence our consideration by addressing what appears on its face to be a logical assertion that this is a classic case for application of the exclusionary rule.

Firmly rooted in the jurisprudence of constitutional law is the precept that a search conducted pursuant to an illegal

search warrant is unreasonable within the meaning of the Fourth Amendment to the Constitution of the United States and Article I, Section 12 of the Florida Constitution. Evidence obtained by virtue of an unreasonable search is inadmissible, either in federal or in a state court, by virtue of the exclusionary rule *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed. 2d 1081 (1961). In *Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed. 2d 1067 (1976) the court explained portions of the rationale for the rule, stating:

> The primary justification for the exclusionary rule then is the deterrence of *police conduct* that violates Fourth Amendment rights. Post-*Mapp* decisions have established that the rule is *not a personal constitutional right. It is not calculated to redress the injury to the privacy of the victim* . . . .
>
> . . . [D]espite the broad deterrent purpose of the exclusionary rule, it has never been interpreted to proscribe the introduction of illegally seized evidence in all proceedings or against all persons. *As in the case of any remedial device, "the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served." Id.* at 486, 96 S.Ct. at 3048, 99 L.Ed. 2d at 1083 (citations omitted) (emphasis supplied).

That rationale applies here, insists appellee, because use by the police of information voluntarily offered by an attorney in violation of the attorney-client privilege constitutes police misconduct.

It is true that the attorney for an accused could not be called by the state as a witness against his client, *State v. Schroeder*, 112 So.2d 257 (Fla. 1959), nor subpoened to provide information against his client's interests, *Anderson v. State*, 297 So.2d 871 (Fla. 2nd DCA 1974). It is equally clear that where the state surreptitiously intrudes upon an exchange of

information between attorney and client that information becomes tainted and subject to exclusion. *Coplon v. United States*, 191 F.2d 749 (D.C. Cir. 1951), cert. denied 342 U.S. 926 (1952). In each of these instances, however, the state has taken positive action which constitutes "police misconduct" within the context of the rule. This is not the case where the police are merely the passive recipients of information, from whatever source. For the classic rule to be invoked, there must be some deterrent effect to illegal conduct by or on behalf of the state. The act of accepting information in a lawful manner and acting upon it simply does not have any recognizable characteristics of police misconduct. Appellee's bare assertion to the contrary fails to even remotely persuade that police misconduct is involved here.

Appellee further suggests, however, that based upon Sixth Amendment and other considerations, the exclusionary rule should be extended to include "attorney-misconduct" in the form of violations of the attorney-client privilege.

The attorney-client privilege renders inadmissable in a criminal trial testimony of an attorney concerning communications which come within the privilege. *Anderson v. State*, supra. To this extent, then, we have an existing "exclusionary rule" applicable to privileged testimony. This exclusion also precludes the state from compelling the disclosure of privileged information at any stage of the proceedings. Thus the state could not compel the disclosures which occurred in the instant case. The exclusion of privileged communications is broader than the exclusion for police misconduct. For example, the former is available in the context of grand jury proceedings, *State v. Schroeder*, supra, whereas the latter is not. The unanswered question is whether this exclusion, already broader in scope, should be expanded still further to preclude the use of information furnished in violation of the privilege at any stage of criminal proceedings.

It is strenuously contended that an affirmative response is appropriate because (1) effective assistance of counsel may be denied if the accused is aware that counsel may voluntarily violate the attorney-client privilege to the detriment of the accused; and (2) the attorney-client privilege is emasculated if counsel may violate it with impunity.

In *Anderson v. State*, supra at 872, the court emphasized the limitations within which the attorney-client privilege operates. Quoting from Wigmore on Evidence, the court explained:

> [T]he privilege remains an exception to the general duty to disclose. Its benefits are all indirect and speculative; its obstruction is plain and concrete . . . . It is worth preserving for the sake of a general policy, but it is nonetheless an obstacle to the investigation of the truth. It ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle." 8 Wigmore, Evidence § 2291 (McNaughton rev. 1961).

Assuming, then, that the privilege is and should be relatively limited in its scope we perceive in these two arguments no sufficient justification for extending its ramifications to exclude the use of evidence voluntarily submitted by an attorney in violation of the privilege. Such evidence, therefore, is competent to establish the probable cause necessary to sustain issuance of a search warrant.

The Sixth Amendment argument is clearly unavailing. The denial of effective assistance of counsel refers only to the assistance to be rendered presently in the context of a criminal proceeding. *Stevenson v. Reed*, 391 F.Supp, 1375 (N.D. Miss. 1975), aff'd, 530 F.2d 1207 (5th Cir. 1976), cert. denied, 429 U.S. 944 (1976). It has no reference to violations of the privilege by former counsel of the accused in prior matters.

Nor is threatened emasculation of the privilege a sufficient justification for creating an exclusion under these circumstances. To the extent that appellee has been damaged by a violation of the privilege, his remedy is by civil proceedings against his former attorney. Violation of the privilege by the attorney is punishable through machinery established by the Florida Bar and the Supreme Court for enforcing and punishing violations of the Code of Professional Responsibility. If both of these possibilities are insufficient to deter violations of the privilege, certainly a rule of exclusion would have little additional deterrent effect. As a matter of practicality in most cases the attorney will have little interest in whether or not the evidence is excluded.

Appellee next suggests that an affidavit, to be sufficient to support the issuance of a search warrant, must be based upon "competent" evidence given by a "competent" witness. Applying this proposition to the present case, appellee contends that information furnished in violation of the attorney-client privilege is not competent evidence and that an attorney disclosing such information is not a competent witness. In the context of an affidavit for a search warrant, though, competency refers not to the admissibility of the evidence at trial or to the capacity of the source of the information to testify; rather it refers to the *reliability* of the information and its source. See *State v. Wolff*, 310 So.2d 729 (Fla. 1975). Thus, hearsay information, although inadmissable as evidence in a trial, may constitutionally form the basis of an affidavit for a search warrant. *State v. Wolff, supra.*

Appellee suggests that an exclusionary rule should be created to prevent or deter the unreasonable interception of private communications, prohibited by Article I, Section 12 of the Florida Constitution. To reach this issue we would first have to make a determination that the act of a police officer in

listening to an attorney voluntarily giving him information in violation of the attorney-client privilege is guilty of the unreasonable interception of a private communication. Aside from being a contradiction in terms, we are unable to discern what it is that could be considered "unreasonable" under these circumstances. We therefore reject the hypothesis.

Finally, appellee argues that an exclusionary rule is essential to the continued vitality of the attorney-client privilege. As previously discussed, an exclusionary rule would have little (if any) deterrent effect on intentional violators of the privilege.

We therefore hold that the order granting the motion to suppress evidence protected by the attorney-client privilege is erroneous and is hereby reversed.

The case is remanded for further proceedings.

REVERSED AND REMANDED.

ANSTEAD, J., concurs.
BERANEK, J., concurs specially with opinion.

BERANEK, J., concurring, specially:

I concur in the result reached by the majority. My review of the record leads me to conclude that the matters disclosed by the attorney were in the nature of ongoing and future criminal conduct. As such, they were not within the attorney-client privilege.

APPENDIX B

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA

STATE OF FLORIDA,	)	
	)	
Plaintiff,	)	
vs.	)	CASE NOS. 77-7060 CF
	)	and 78-494 CF
	)	
HILMER B. SANDINI,	)	
	)	
Defendant.	)	
	)	

Judge: Mel Grossman

ORDER

THIS CAUSE having come on to be heard upon the Defendant's Motion to suppress Evidence, the Court has made the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. That a continuous, ongoing professional and social relationship existed between the Defendant and Mr. Robert S. McCain, Jr., an attorney, from April of 1977 until September of 1977, during which time the Defendant employed Mr. McCain to represent him on several different legal matters.

2. That during the period from April, 1977, to September, 1977, a number of communications were made between the Defendant and McCain which the Defendant intended to be held in confidence and in which he had the right to expect that they would be so held.

3. That McCain, subsequent to the aforesaid confidential communications with the Defendant, disclosed the substance of portions of these communications to both a special agent for the FBI and members of the Fort Lauderdale Police Department.

4. That the communications by McCain to the aforesaid law enforcement authorities were styled as those of a "confidential informant" by the Fort Lauderdale Police Officers who sought and obtained the issuance of a search warrant for the residence of the Defendant on December 7, 1977, and that the "confidential informant" referred to in the affidavit for warrant filed at the time the warrant was applied for was McCain.

5. That the aforesaid search warrant for the residence of the Defendant was executed on December 7, 1977, by members of the Fort Lauderdale Police Department, as a result of which the Defendant was charged with numerous crimes.

6. There exists material conflict between the sworn statements contained in the search warrant affidavit and those made by McCain at the suppression hearing as to whether McCain was in fact a confidential informant and as to the frequency of his performance in such capacity.

7. That McCain also represented on Nathan Klinger after that individual was arrested based upon some of this same information provided the law enforcement authorities by McCain concerning the instant defendant.

8. That, having observed the demeanor of McCain, while testifying, the Court finds that McCain's testimony lacks

credibility. As a result, this Court finds that an attorney-client relationship existed between the Defendant and McCain from April, 1977, to September, 1977, and that during this period, the Defendant spoke to and sought the legal advice of McCain as an attorney and intended that his private communications to McCain be held in complete confidence.

Moreover, the Court concludes that, but for the privileged information provided by McCain, a search warrant for the residence of the Defendant could not have been procured and the affidavit for search warrant, being founded on such privileged information between an attorney and client is defective as a matter of law. Consequently, the search warrant executed on December 7, 1977, being premised upon the insufficient affidavit, is likewise invalid and the fruits of its execution should properly be suppressed as evidence against the Defendant.

In addition, to deny the Defendant's Motion to Suppress would be to endorse the practices which have occurred in this case and risk the prospect of encouraging future instances of attorneys improperly serving as confidential informants against their clients. Such a practice would be obviously contrary to and inconsistent with the attorney-client privilege as contained in law and, specifically the Code of Professional Responsibility.

The Defendant has argued the applicability of Art. I, Section 12, Declaration of Rights of the Florida Constitution, which states the right of persons to be secure against "unreasonable interception of private communications by any means." He argues that this right of privacy in the area of private communications extends beyond the scope of protections afforded one by the Fourth Amendment to the United States Constitution, and that the drafters of the Florida Constitution intended to protect the sanctity of private

communications between individuals, such as attorney-client communications. However, this question need not be reached by this Court and it therefore refrains from addressing that matter.

Finally, this Court holds that the use of privileged information obtained from the attorney of a criminal suspect by a law enforcement agency so as to enable the latter to procure a search warrant directed against the attorney's client violated the Sixth Amendment right to counsel of the Defendant.

ORDERED AND ADJUDGED that the Defendant's Motion to Suppress Evidence be and the same is hereby granted.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 25th day of July, 1979.

CIRCUIT JUDGE

Copies furnished:

Edward M. Kay, Esquire
State Attorney's Office

APPENDIX C

IN THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT WEST PALM BEACH, FLORIDA

STATE OF FLORIDA,	)	
	)	
Appellent,	)	
	)	
vs.	)	CASE NOS. 77-7060 CF
	)	and 78-494 CF
	)	APPEAL NO. 79-1810
	)	
HILMER B. SANDINI,	)	
	)	
Appellee	)	
	)	

RECORD ON APPEAL FROM THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA—CRIMINAL DIVISION.

VOLUME I PAGES 1 to 102

HON. ROBERT BOGEN,
Assistant Attorney.

HON. EDWARD M. KAY,
Attorney for Appellee.

belabor it.

THE COURT: Do either counsel wish to file additional memorandums?

MR. SPRINGER: I do not, sir.

MR. KAY: Just if Your Honor would take notice of, I'll give you a copy of Tollett.

MR. SPRINGER: I'll stipulate to whatever you read about Tollett because I agree with that case. But again you are getting back to state action.

MR. KAY: That's all we have, Your Honor.

THE COURT: We've reached the conclusion of a rather lengthy process. The problem I have, Mr. Springer, is that I have a number of problems, one of which is I don't find Mr. McCain, having had an opportunity not only to hear his words but to hear his tone and to observe his demeanor and appearance, I don't find him very credible.

Without getting into the question of whether or not that particular information in the search warrant in and of itself is necessary, you've got law enforcement officers indicating that they began this investigation as a result of information from a confidential reliable informant. Several times in the past he's alleged to have given information, always proved reliable and has resulted in arrest in the past which taken in the light most favorable to Mr. McCain he equivocated about, taken in the light least favorable to him he, in fact, denied.

During his testimony, to buttress his story periodically he would produce conversations that he received from other clients and then the most incredible thing is that he winds up representing one of these individuals who is arrested based upon information that he gives to them.

I have a hard time condoning that and I understand your argument and, you know, I have some discomfort with the

idea of suppressing physical evidence in this particular case, and I'll be quite candid with both counsel. I have some discomfort doing that but I have more of a problem with indicating by not suppressing it not only that this is tolerable and proper conduct on the part of a lawyer and that indication by that that Sixth Amendment rights as well as Fourth Amendment rights, mainly Sixth Amendment rights are not put in jeopardy by the kind of conduct of a lawyer taking information from a client and, you know, my finding from his testimony taken as a whole is that there was a continuing relationship, and you can say all you want that it starts and it stops at any point in time. But if a lawyer does business from time to time with a client and has this continuing pattern of activity, one, two, three, whatever, when that individual goes to a lawyer and discusses a matter with that lawyer, there is an aura of lawyer-client relationship and I think to argue to the contrary, I just don't think that that's appropriate.

I think the other concern that I have is the fact that, you know, law enforcement agencies can take information from an attorney, label it a confidential reliable informant, and then proceed on that basis and I think that that's another area, and it's all well and good to argue as you have in the past quite capably that the proper remedy for Mr. McCain in this case is potential disciplinary proceedings, whether it's under 1114 and I ask Mike Satz or direct Mike Satz to file disciplinary proceedings or whether it's through the Bar or grievance proceedings, but I think what we're talking about here goes a little bit broader about what happens to Mr. McCain and that's what happens to any member of our society if, in fact, when you go and you discuss a matter with a lawyer and instead of getting advice you get a conduit to someone else I think if I don't suppress the evidence, then I enforce the establishment and existence of that kind of conduct or conduit and I'm going to grant the motion to suppress.

APPENDIX D

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA FOURTH DISTRICT

STATE OF FLORIDA	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. 79-1810
	)	
HILMER B. SANDINI	)	
	)	
Appellee.	)	
	)	

April 22, 1981

BY ORDER OF THE COURT:

ORDERED that the March 19, 1981 Motion filed by Appellee to stay mandate pending discretionary review is denied; further,

ORDERED that Appellee's March 19, 1981 Motion for Rehearing En Banc is denied.

I hereby certify the foregoing
is a true copy of the original
court order.

CLYDE L. HEATH,
CLERK

cc: Kay and Silber, P.A.
Attorney General

APPENDIX E

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA

STATE OF FLORIDA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CASE NOS. 77-7060 CF
	)	and 78-494 CF
	)	
HILMER B. SANDINI,	)	
	)	
Defendant.	)	
	)	

Judge: Grossman

MOTION TO SUPPRESS EVIDENCE

COMES NOW the Defendant, HILMER B. SANDINI, by and through his undersigned attorneys, and pursuant to Rule 3.190(h) of the Florida Rules of Criminal Procedure, moves for the entry of an order by this Honorable Court suppressing as evidence in the above-styled causes certain certificates of title, methaqualone, PCP, one .38 caliber Colt revolver, other personalty and/or alleged contraband, and any and all written or oral statements obtained by police at the

time of the Defendant's arrest, and as grounds therefore would show unto this Court the following:

1. That the facts are best known to the State by virtue of the police reports filed in these causes.

2. That the facts as best known to the Defendant are that agents of the Ft. Lauderdale Police Department did enter the premises of the Defendant by means of a search warrant signed by the Hon. Robert W. Tyson, Jr., one of the Judges of the above-styled Court, on December 7, 1977.

3. That pursuant to the search warrant aforementioned which was served upon the Defendant on December 9, 1977, certain inculpable personalty and alleged contraband was procured and confiscated which the State intends to use in the trial of the above-styled cause.

4. That the aforementioned search warrant is insufficient on its face.

5. That the property seized pursuant to the aforementioned search warrant was not that described in the search warrant.

6. That there was no probable cause for believing the existence of the grounds on which the aforementioned search warrant was issued.

7. That the aforementioned search warrant was illegally executed.

8. That the aforesaid personalty and alleged contraband obtained from the Defendant's premises and any written or oral statements or admissions against interest obtained from the Defendant at the time of his arrest, were procured by agents of the Ft. Lauderdale Police Department in violation of the Defendant's Fourth Amendment rights as guaranteed by the United States Constitution, as well as the rights guranteed Defendant in the Declaration of Rights of the Constitution of the State of Florida and the laws as they presently exist in the State of Florida.

WHEREFORE, Defendant prays this Honorable Court grant him an evidentiary hearing prior to or at the time of trial to determine the merits of this his Motion to Suppress Evidence.

I HEREBY CERTIFY that a copy of the foregoing was furnished the State Attorney's Office, 640 Broward County Courthouse, Fort Lauderdale, Florida this 14th day of March, 1979.

KAY, RODERMAN and
SILBER, PA.
Attorneys for Defendant Sandini
510 S.E. Seventeenth Street
Ft. Lauderdale, Florida 33316
Telephone: (305) 764-0033;
944-1841

Edward M. Kay

Opposition

Supreme Court, U.S.
FILED
MAR 26 1982
ALEXANDER L. STEVAS
CLERK

CASE NO. 81-1225

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1980

HILMER B. SANDINI,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT, STATE OF FLORIDA

JIM SMITH
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The Capitol
Tallahassee, Florida 32304

ROBERT L. BOGEN
Assistant Attorney General
Counsel of Record

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Attorneys for Respondent

QUESTION PRESENTED

Whether privileged material voluntarily offered by an attorney in violation of his duty to his client may be used to establish the probable cause necessary to support the issuance of a search warrant.

(Restated)

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STATEMENT OF THE CASE

Respondent accepts Petitioner's Statement of the Case to the extent that it is non-argumentative and presents an accurate recitation of proceedings in the State courts, with the following additions and/or clarifications:

Petitioner was charged in two informations comprising a total of eight counts with, inter alia, possession of blank or stolen vehicle titles, grand theft of motor vehicles, and receiving a stolen motor vehicle (Respondent's Appendix A). Petitioner alleged and the trial court found that an attorney-client relationship existed between him and Robert McCain from April of 1977 until September of 1977, during which period Petitioner employed McCain to represent him on several legal

matters, and during which a number of confidential communications were made (Petitioner's Appendix B). The allegedly-confidential communications concerned certain transfers of automobiles in which Petitioner was involved (Respondent's Appendix B). At the suppression hearing in the trial court, the parties were in agreement that McCain approached law enforcement authorities after he became concerned about his own possible criminal culpability arising from his involvement with Petitioner (Respondent's Appendix C).

On appeal, Respondent argued that an attorney-client relationship did not exist during the entire time alleged by Petitioner, and that all of the allegedly-confidential communications occurred

after the professional relationship had ceased, and were unrelated to it. The Fourth District Court of Appeal deemed it unnecessary to decide these preliminary questions because of their decision on the legal issues, although the concurring judge agreed with Respondent's alternative argument that the communications concerned ongoing and future criminal conduct to which the attorney-client privilege does not apply (Petitioner's Appendix A).

REASONS FOR DENYING THE WRIT

I

THE DECISION BELOW LACKS THE FINALITY REQUIRED FOR REVIEW BY THIS COURT, AND PRESENTS NO SUBSTANTIAL FEDERAL QUESTION.

Pursuant to 28 U.S.C. §1257, this Court has jurisdiction to review state court decisions which are final judgments within the meaning of that statute. In criminal cases, finality is normally defined by the imposition of the sentence. Flynt v. Ohio, ___U.S.___, 101 S.Ct. 1958, 68 L.Ed.2d 489 (1981). In the instant case, the Fourth District Court of Appeal reversed a pre-trial order granting a motion to suppress evidence. Since there has been no trial, no judgment, and no sentence, Respondent maintains that this case lacks the requisite finality for review by this Court at this time. See

DiBella v. United States, 369 U.S. 121 (1962). See also Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 476-483 (1975). Compare Abney v. United States, 431 U.S. 651 (1977) with Flynt v. Ohio, supra.

Furthermore, there is no federal question presented here, let alone a substantial federal question. First, regarding the Fourth Amendment, both the trial and appellate courts below found that attorney McCain volunteered the allegedly-privileged information to the police. Petitioner argued that the police acted improperly in using the volunteered information to procure a search warrant, but he never contended that the police either sought out or instigated the disclosures. Of course, the exclusionary rule was judicially created to deter police misconduct which

violates Fourth Amendment rights. Stone v. Powell, 428 U.S. 465, 482-484 (1976); Mapp v. Ohio, 367 U.S. 643, 654-657 (1961). Since, as the Fourth District ruled, the police in this case were "merely the passive recipients of information," this case presents no Fourth Amendment issue.

Nor does this case present an issue under the Sixth Amendment. Petitioner argued, and the trial court ruled, that an attorney-client relationship existed between Petitioner and McCain from April of 1977 until September of 1977. The contested search warrant was executed in December of 1977. On appeal Respondent argued, and the Fourth District agreed, that the Sixth Amendment's guarantee of effective assistance of counsel applies, by the express terms of the Amendment, only to an accused faced

with criminal prosecution. See Stevenson v. Reed, 391 F.Supp. 1375, 1379 (N.D.Miss. 1975), aff'd, 530 F.2d 1207 (5th Cir.), cert. denied,429 U.S. 944 (1976). Thus, the Fourth District ruled that Petitioner's Sixth Amendment argument was "clearly unavailing," because the violation of confidences by a criminal defendant's former attorney who represented him only in prior, unrelated matters (during which the confidences were gained) has no bearing on that defendant's right to effective assistance of counsel in the later criminal proceeding. Rather, the Fourth District deemed the only issue in this case to be the attorney-client privilege. That privilege is a matter of state, nor federal, law. See Beckler v. Superior Court, Los Angeles County, 568 F.2d 661, 662 (9th Cir. 1978).

Therefore, Respondent maintains that this case presents no federal question, much less a substantial federal question

II

THE DECISION BELOW DOES NOT ADVERSELY AFFECT THE ATTORNEY-CLIENT PRIVILEGE, AND CORRECTLY DECLINED TO APPLY THE EXCLUSIONARY RULE IN THIS CONTEXT.

As Respondent argued in both the trial and appellate courts, it does not sanction violations of the attorney-client privilege. Rather, Respondent's concern has been how the confidentiality of the attorney-client relationship can best be vindicated while at the same time recognizing the importance of the search for truth in the criminal justice system. In prior cases, this Court has recognized that among the costs of the exclusionary

rule is the loss of evidence which is "typically reliable and often the most probative information bearing on the guilt or innocence of the defendant," and that "application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served." Stone v. Powell, supra at 486-489. Further, it should be remembered that it was the absence of alternative remedies which largely led this Court to extend the exclusionary rule to the states. Mapp v. Ohio, supra, at 651-652. It should be noted that what Petitioner seeks in this proceeding is the totally-unprecedented application of the exclusionary rule to vindicate a professional ethical duty and/or evidentiary privilege, not a constitutional right.

As the Fourth District concluded, the exclusionary rule would have little (if any) deterrent effect on violations of the attorney-client privilege. Rather, as Respondent has argued below, the best remedy is rigorous enforcement of the Code of Professional Responsibility. Why should the attorney care if the evidence is suppressed? On the other hand, suspension or disbarment would hit an offending attorney where it really hurts, would plug the kind of breach of which Petitioner complains at its source, but would not provide a windfall to the defendant in the form of the suppression of evidence.

Respondent agrees with Petitioner that this is a unique case. Indeed, its very uniqueness is one of the best reasons why the exclusionary rule should not be

applied here. In United States v. Calandra, 414 U.S. 338 (1974), this Court declined to extend the exclusionary rule to grand jury proceedings. Respondent would commend for this Court's consideration in the instant case the following three-pronged analysis which can be derived from the teachings of the Calandra case and Mapp v. Ohio, supra. First, does this case present a variety of misconduct of which there is a high incidence? In light of the uniqueness of this case, the answer to that question is clearly no. Second, are there no presently-available remedies? As Respondent has already argued, unlike in Mapp, effective remedies are presently available, the effectiveness of which is again illustrated by the uniqueness of this case. Third, would the appli-

cation of the exclusionary rule in this case achieve only a speculative and minimal advance in the deterrence of the misconduct at issue beyond that which is already effected by present remedies? Respondent maintains that the answer to that question is yes, and that the Fourth District correctly stated that if civil proceedings by a criminal defendant such as Petitioner against his former attorney "are insufficient to deter violations of the privilege, certainly a rule of exclusion would have little additional deterrent effect." Again, why should the attorney care if the evidence is excluded? He certainly would care, however, if it was he who was excluded from the practice of his profession.

In short, Respondent maintains that transplanting the exclusionary rule

from its native soil in the Fourth Amendment into the context of this case cannot be justified in view of the costs of its application, and the minimal (if any) deterrent effect which it would have on violators of the attorney-client privilege.

CONCLUSION

For these reasons, Respondent respectfully requests that the instant Petition for Writ of Certiorari to the District Court of Appeal, Fourth District, State of Florida, be denied,

Respectfully submitted,

JIM SMITH
Attorney General

ROBERT L. BOGEN
Assistant Attorney General
Counsel of Record

RUSSELL S. BOHN
Assistant Attorney General
111 Georgia Avenue - Suite 204
West Palm Beach, Florida 33401
Telephone (305) 837-5062

Attorneys for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this _____day of_____, 1982, three copies of the foregoing has been furnished, by mail, to Edward M. Kay, Esq., D. Robert Silver, Esq., and Douglas J. Glaid, Esq., Kay and Silber, P.A. 510 Southeast Seventeenth Street, Fort Lauderdale, Florida 33316.

_____
ROBERT L. BOGEN

Appendix

APPENDIX A

IN THE CIRCUIT COURT OF THE
SEVENTEENTH JUDICIAL CIRUCIT
IN AND FOR BROWARD COUNTY, FLORIDA
(F) 319.33(4)

THE STATE OF FLORIDA

vs.

HILMER B. SANDINI a/k/a
HILMER SANDINE a/k/a
LOU BENJAMIN

INFORMATION FOR

I.	POSSESSION OF A BLANK MOTOR VEHICLE TITLE
II.	POSSESSION OF A BLANK MOTOR VEHICLE TITLE
III.	POSSESSION OF A BLANK MOTOR VEHICLE TITLE
IV.	POSSESSION OF METHAQUALONE
V.	POSSESSION OF PCP
VI.	GRAND THEFT
VII.	POSSESSION OF A FIREARM BY FELON

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA:

COUNT I

MICHAEL J. SATZ, State Attorney of the Seventeenth Judicial Circuit of Florida, as Prosecuting Attorney for the State of Florida in the County of Broward,

by his undersigned Assistant State Attorney, charges that

HILMER B. SANDINI a/k/a HILMER SANDINE a/k/a LOU BENJAMIN

on the 7th day of December A.D. 1977, in the Court and State aforesaid, did unlawfully and knowingly and with intent to defraud persons unknown, have in his possession a blank, forged, ficititious, counterfeit, stolen, or fraudulently or unlawfully obtained certificate of title, or other indicia or ownership of a motor vehicle, contrary to F.S. 319.33(4),

COUNT II

And MICHAEL J. SATZ, State Attorney of the Seventeenth Judicial Circuit of Florida, as Prosecuting Attorney for the State of Florida in the County of Broward, by his undersigned Assistant State Attorney, further charges that HILMER B. SANDINI a/k/a HILMER SANDINE a/k/a LOU BENJAMIN on the 7th day of December, A.D. 1977, in the County and State aforesaid, did unlawfully and knowingly and with intent to defraud persons unknown, have in his possession a blank, forged ficititious, counterfeit, stolen, or fraudulently or unlawfully obtained certificate of title, or other indicia or ownership of a motor vehicle, contrary to F.S. 319.33(4).

COUNT III

And MICHAEL J. SATZ, State Attorney of the Seventeenth Judicial Circuit of Florida, as Prosecuting Attorney for the State of Florida in the County of Broward, by his undersigned Assistant State Attorney, further charges that HILMER B. SANDINI a/k/a HILMER SANDINE a/k/a LOU BENJAMIN on the 7th day of December, A.D. 1977, in the County and State aforesaid, did unlawfully and knowingly and with intent to defraud persons unknown, have in his possession a blank, forged, ficititious, counterfeit, stolen, or fraudulently or unlawfully obtained certificate of title, or other indicia or ownership of a motor vehicle, contrary to F.S. 319.33(4),

COUNT IV

And MICHAEL J. SATZ, State Attorney of the Seventeenth Judicial Circuit of Florida, as Prosecuting Attorney for the State of Florida in the County of Broward, by his undersigned Assistant State Attorney, further charges that HILMER B. SANDINI a/k/a HILMER SANDINE a/k/a LOU BENJAMIN on the 7th day of December, A.D. 1977, in the County and State aforesaid, did unlawfully have in his actual or constructive possession a controlled substance, to-wit: Methaqualone, contrary to F.S. 893.03(3)(a) and F.S. 893.13(1)(e),

COUNT V

And MICHAEL J. SATZ, State Attorney of the Seventeenth Judicial Circuit of Florida, as Prosecuting Attorney for the State of Florida in the County of Broward, by his undersigned Assistant State Attorney, further charges that HILMER B. SANDINI a/k/a HILMER SANDINE a/k/a LOU BENJAMIN on the 7th day of December, A.D. 1977, in the County and State aforesaid, did unlawfully have in his actual or constructive possession a controlled substance, to-wit: Phencyclidine, commonly known as PCP, contrary to F.S. 893.03(3)(a)8. and F.S. 893.13(1)(e),

COUNT VI

And MICHAEL J. SATZ, State Attorney of the Seventeenth Judicial Circuit of Florida, as Prosecuting Attorney for the State of Florida in the County of Broward, by his undersigned Assistant State Attorney, further charges that HILMER B. SANDINI a/k/a HILMER SANDINE a/k/a LOU BENJAMIN on the 7th day of December, A.D. 1977, in the County and State aforesaid, did then and there unlawfully obtain or use, or endeavor to obtain or use the property of Randolph J. Erickson, to-wit: a 1977 Lincoln Continental motor vehicle, VIN 7Y825859267, with the intent to appropriate the property to his own use or to the use of any person not entitled thereto, knowing or having reason to know said property was stolen, contrary to F.S. 812.014(1)b., and F.S. 812.014

(2)b,

COUNT VII

And MICHAEL J. SATZ, State Attorney of the Seventeenth Judicial Circuit of Florida, as Prosecuting Attorney for the State of Florida in the County of Broward, by his undersigned Assistant State Attorney, further charges that HILMER B. SANDINI a/k/a HILMER SANDINE a/k/a LOU BENJAMIN on the 7th day of December, A.D. 1977, in the County and State aforesaid, having previously been convicted on the 10th day of March, A.D. 1975, of the felony crime of Sale of Unregistered Securities (five(5) counts), Sale of Unregistered Securities without Registering as a Dealer or Salesman (two(2)Counts),and Fraudulent Transactions, Falsifications, or Concealment of Facts (one(1) count), in the Circuit Court in and for Broward County, Florida, did then and there unlawfully have in his possession a firearm, to-wit: a .38 caliber Colt Cobra revolver, contrary to F.S. 790.23,

* * * *

IN THE CIRCUIT COURT OF THE
SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

(F) 812.031(1) & 812.031(2)(d)

THE STATE OF FLORIDA

vs.

HILMER B. SANDINI

INFORMATION FOR

RECEIVING STOLEN PROPERTY

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA:

MICHAEL J. SATZ, State Attorney of the Seventeenth Judicial Circuit of Florida, as Prosecuting Attorney for the State of Florida in the County of Broward, by his undersigned Assistant State Attorney, charges that

HILMER B. SANDINI

between the 24th day of March, A.D. 1977, and the 20th day of August, A.D.

1977, in the County and State aforesaid did unlawfully and intentionally receive, retain, dispose of or aid in the concealment of a stolen motor vehicle, to-wit: a 1975 Cadillac motor vehicle, VIN: 6D49S5Q130727, without the consent of Roger B. Gustafson, the owner or person entitled to possession thereof, knowing that said motor vehicle had been stolen or under such circumstances as would induce a reasonable man to believe that it was stolen, contrary to FLS. 812.031 (1) and FLS. 812.031(2)(d),

* * * *

APPENDIX B

IN THE CIRCUIT COURT OF THE
SEVENTEENTH JUDICIAL CIRUCIT
IN AND FOR BROWARD COUNTY, FLORIDA

Case Nos.: 77-7060CF
& 78-494CF

Judge : Grossman

STATE OF FLORIDA, :

Plaintiff, :

vs. :

HILMER B. SANDINI, :

Defendant. :

MEMORANDUM IN SUPPORT OF
DEFENDANT'S MOTION TO
SUPPRESS EVIDENCE

PRELIMINARY STATEMENT

The symbol "A" refers to the Appendix attached to this Memorandum.

FACTS

In the early part of 1977, the Defendant retained an attorney by the name of Robert S. McCain, Jr. (A-3). A "continuing" attorney-client relationship existed between the Defendant and McCain until approximately September of 1977 (A-6, 27). During this period of time, McCain handled several different

legal matters for the Defendant. More specifically, at some point during this period, the Defendant went to McCain's office and sought his legal advice with respect to a questionable vehicle registration certificate the Defendant had received from one "Frank Malone" (A-9, 10). Also, during this same period, McCain came to Defendant's apartment, at which time Defendant and McCain had confidential discussions regarding several cars, and at which time Defendant showed McCain some documents regarding a Lincoln Concinental he had received from Malone (A-10). McCain advised Defendant that these documents were invalid (A-10). The Defendant also informed McCain on this occasion that he had introduced one Nathan Klinger to Malone, and that Malone had sold a 1975 or 1976 Cadillac to Klinger. The Defendant's purpose for informing McCain of all of these matters was that since Defendant was on probation, he desired to avoid any possible legal or "criminal problems" (A-9,11-12).

On December 7, 1977, the Hon. Robert W. Tyson, Jr., Circuit Court Judge, upon the Affidavit of Sgt. Michael R. Bushell of the Fort Lauderdale Police Department (A-33), signed a search warrant authorizing a search of Defendant's apartment for "stolen motor vehicles, records, documents, and stolen Florida vehicle registration certificates used in the receiving and disposition of stolen motor vehicles" (A-37). Subsequently, Defendant swore

by affidavit that the confidential informant referred to in the aforesaid search warrant affidavit was, in fact, Robert S. McCain, Jr., and that any information alleged in the search warrant affidavit to be related by a confidential informant was, in fact, related by McCain in violation of the attorney-client privilege which existed between the Defendant and McCain (A-39).

* * * *

APPENDIX C

IN THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT
WEST PALM BEACH, FLORIDA

STATE OF FLORIDA,	:	
Appellant,	:	CASE NO. 77-7060 & 78-494
vs.	:	APPEAL NO. 79-1810
HILMER B. SANDINI,	:	
Appellee.	:	
_____	:	

RECORD ON APPEAL FROM THE CIRUCIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA - CRIMINAL DIVISION.

VOLUME I. PAGES 1 TO 102

HON. ROBERT BOGEN,
Assistant Attorney.

HON. EDWARD M. KAY,
Attorney for Appellee.

* * * *

MR. SPRINGER [Assistant State Attorney]: Yes, did I say it wrong? No wait. He went to the F.B.I. first and then the Colombian happened.

THE COURT: That was his testimony.

MR. SPRINGER: That was the one factual thing I wanted to point out, and the other one is, Judge, and this is really by way of argument and that is my whole point other than the threshhold issue which I think we shouldn't have done this anyway because it's the wrong form -- but I won't go into that again -- we've got memos on that. The factual thing I feel is that what Mr. McCain was feeling is that Sandini was involved in all this illegal activity and it started with the discovery of the cars behind his law office where he gave him permission to use that. He felt that he was going to get dragged in and be involved, either by way of conspiracy or an actual principal, in these things, and when the actions of a client are going to criminally involve an attorney, the attorney has a right to defend himself and protect himself from charges and so on.

I think when this officer, agent, testified that that was one of the things, his opinion was that's why he came to -- his words were to separate himself from the activities of those people in charges of conspiracy, whatever, and that's why he came forward and that's the only factual thing I

really wanted to point out.

MR. KAY [defense counsel]: Well, I want to point out that factually that I think Mr. McCain was as bad a witness as he would like to have some of the people that he was interrogating be, that his memory served him when it had to be served and it didn't on other occasions. Did you talk to the Fort Lauderdale Police Department? "To the best of my knowledge". I was kidding. That's a standard policeman's answer to everything; "To the best of my knowledge".

I think that factually what we have here is just a tip of the iceberg concerning Mr. McCain and these people, client Sandini and these other clients that he's dealing with and, yes, he got himself into the situation with these people. There probably wasn't any question about it, and he started saying, "I might be doing some things illegally myself," and he went to the F.B.I. because he trusted this F.B.I. agent. No question about that.

But you cannot -- as an attorney the way to handle the thing is not to become a confidential informant of the Fort Lauderdale Police Department and turn your clients and your clients' secrets in, and I think the proper way of doing something like this, if he thought the car was out of his driveway, was to simply tell Sandini that the cars are in the driveway and I'm going to the police; simple as that. Tell

him. But he didn't do that. Instead, he snuck around. He broke the attorney-client privilege. Our Sixth Amendment rights are violated and I think the Court has two cases in front of it.

* * * *